Supreme Court, U. S.
FILED
FEB 13 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1138

RON PATTERSON - - - - - Petitioner

— V. —

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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Kentucky Revised Statute Chapter 514, Section 040 is arbitrary and irrational in violation of the due process clause of the 14th Amendment, and the State Court decided a federal question in a manner not in accord with applicable decisions.	
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. _____

RON PATTERSON - - - - - Petitioner

— V. —

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Petitioner prays that a writ of certiorari issue to review the judgment herein of the Supreme Court of Kentucky which, by Order Denying Discretionary Review, dated November 14, 1977, affirmed the opinion of The Court of Appeals of Kentucky, on which mandate was issued on November 18, 1977.

OPINION BELOW

No opinion was rendered by the Supreme Court of Kentucky. The order of the Supreme Court of Kentucky, denying a review of the decision of the Court of Appeals, is set forth in the Appendix, *infra*, at p. 15. The opinion of the Court of Appeals of Kentucky is set forth in the Appendix, *infra*, at pp. 10-14. The mandate of the Court of Appeals of Kentucky is set forth

in the Appendix, *infra*, at p. 16. The judgment of conviction entered in the Circuit Court, Jessamine County, Kentucky is set forth in the Appendix, *infra*, at pp. 8 & 9.

JURISDICTION

The judgment of the Supreme Court of Kentucky, denying a review and affirming the petitioner's conviction, was entered on November 14, 1977. The jurisdiction of this Court rests upon 28 U. S. C. Section 1257(3).

QUESTION PRESENTED

Whether Kentucky Revised Statute 514.040 is arbitrary and irrational and a violation of the due process requirements of the 14th Amendment to the United States Constitution when it statutorily presumes criminal "intent" by proof that an issuer of a check returned for insufficient funds did not make the check good within ten (10) days after he learned the check had been dishonored.

STATUTE INVOLVED

Kentucky Revised Statutes, Chapter 514, Section 040 provide in pertinent part as follows:

KRS514.040 Theft by deception

(1) A person is guilty of theft by deception when he obtains property of another by deception with intent to deprive him thereof. A person deceives when he intentionally:

* * *

(e) Issues or passes a check or similar sight order for the payment of money, knowing that it will not

be honored by the drawee.

* * *

(4) For purposes of subsection (1), an issuer of a check or similar sight order for the payment of money is presumed to know that the check or order, other than a postdated check or order, would not be paid if:

* * *

(b) Payment was refused by the drawee for lack of funds, upon presentation within (30) days after issue, and the issuer failed to make good within ten days after receiving notice of that refusal.

STATEMENT OF THE CASE

On July 9, 1976, the petitioner was convicted following a jury trial for theft by deception in violation of Kentucky Revised Statutes Chapter 514, Section 040. He was sentenced to one (1) year in the penitentiary. A timely appeal was taken to the Court of Appeals of Kentucky, and the conviction was affirmed. A timely Motion for Discretionary Review was filed before the Supreme Court of Kentucky, and the conviction was again affirmed.

The facts upon which the conviction was based are as follows:

On October 9, 1975, the defendant wrote a check to John Rankin for $2,955.04 to pay for some leather goods. (T. p. 4).[1] The check was returned for insufficient funds on October 17, 1975. (T. p. 4). It was uncontradicted that the reason for the insufficient funds was that checks from the defendant's clients, too, were returned for insufficient funds, (T. p. 9) and

[1] "T" refers to the transcript of the trial in the Circuit Court of Pulaski County.

because a client, Patch Work Shops, stopped payment on a check which had been deposited, creating insufficient funds in the defendant's account, to pay for the check to John Rankin (T. p. 42).

Other goods were ordered by the defendant on a charge account with John Rankin.

The defendant sent payments to John Rankin totalling, to the penny, the amount of the "cold check", but the funds were applied to the charge account. (T. p. 13).

The check was not made good within ten (10) days after the defendant knew that it had been dishonored.

There is conflicting evidence as to whether the $2,955.04 repaid was to cover the $2,955.04 check. John Rankin said he got no instructions with the payments, so he applied them to the charge account. (T. p. 17 and p. 19).

Yet, there was a check for a $1,000.00 payment written on October 24, 1975, and there was a handwritten note of the same date, as follows:

> "October 24, 1975, Dear John, I just got back in town and found that the bank account is in bad shape. We had a lot of bad checks come back on us from our customers. We will send the rest of what we owe you in a few days. I am very sorry, Ron. Rankin Exhibit No. 2. (T. p. 8).

There was also a money order for a $400 payment dated November 5, 1975. It, too, was applied to the charge account, because there were no instructions to John Rankin. However, a handwritten note bore the same date — November 5, 1975. Here is how John Rankin described that note (T. p. 9).

QUESTION BY COMMONWEALTH ATTORNEY:

> Q. 76 Do you have any other correspondence in which Patterson acknowledged the cold check:

ANSWER BY JOHN RANKIN:

> A. Yes sir. On November 5th, I got another note that was on Unique Christian Ministers, P. O. Box 231. It says, "November 5th, John, will bring up the rest of the money when I come up on the 10th for the rest of the order. Rankin Exhibit No. 3.

How the Federal Question was Raised

The question tendered herein was raised by motion at the close of the evidence by the prosecution (T. p. 35) motion after evidence, and on appeal to the Court of Appeals of Kentucky, and on appeal to the Supreme Court of Kentucky.

Reasons for Granting Certiorari

Some of the logical presumptions raised by the return of a check because of insufficient funds, and the failure to make the check good within ten (10) days, are as follows:

> (1) The issuer made a mathematical error on his balance when he wrote the check.
> (2) A joint account partner or spouse withdrew the funds without notifying the issuer.
> (3) The bank transferred the funds from the issuer's account to pay a debt owed the bank, thereby reducing the issuer's balance.
> (4) The Internal Revenue Service levied on the account depleting the funds.
> (5) Checks from others were deposited and credited to the issuer's account, but were later returned because of "insufficient funds."
> (6) Checks deposited to issuer's account were subject to "stop payment" orders.

(7) The bank credited a deposit to the wrong account.

(8) Others, including the writing of a check on an account with insufficient funds to defraud a payee. (The statutory presumption.)

To satisfy the due process clause of the 14th Amendment to the United States Constitution, the statute must meet and satisfy this Court's requirements:

First, there must be a rational connection between the fact proved and the ultimate fact presumed, *U. S. vs. Gainey*, 380 U. S. 63, 85 S. Ct. 754, 13 L. Ed. 2d 658 (1965).

It is submitted that all of the eight presumptions above listed rationally connect with the fact proved; namely, that payment was refused for insufficient funds, and the check was not made good within ten (10) days.

Second, it must be said with "substantial assurance" that the fact presumed is "more likely than not to flow from the proved fact." *Leary vs. U. S.*, 395 U. S. 6, 89 S. Ct. 1532, 23L. Ed. 2d 57 (1969) — otherwise, it is "irrational" or "arbitrary."

With so many presumptions having a rational connection with the proven fact, how can any *one* presumption, exclusive of the others, be the one to flow "more likely than not" from the proven fact? Common sense tells us that it is impossible to choose one and exclude all others without being arbitrary.

Third, the evidence necessary to invoke the presumption must be sufficient for a rational juror to find the presumed fact, "beyond a reasonable doubt." This Court has stated that this is the most "stringent test." *Barnes vs. U. S.*, 412 U. S. 837, 93 S. Ct. 2357, 37 L. Ed.

2d 380 (1973).

Ron Patterson, the petitioner, explained his insufficient funds to be the result of "stop payment orders" and "insufficient funds" on check he had deposited, thereby depleting the funds in his account. Granted, the jury is not required to believe this uncontradicted testimony. But if they do not so believe, then how are they to conclude, with certainty beyond a reasonable doubt, which other of the presumptions flows more likely than not from the proven fact. To choose one presumption, over all of the others, to the exclusion of a reasonable doubt is a Quixotic exercise, at best.

In this era of mendacity, this is a special and important question of first impression. We should require the statute to meet the very real requirements of the due process clause of the 14th Amendment to the Constitution of the United States, or we should boldly announce that we are of the considered opinion that the problem of cold checks in our business community is more important than individual rights under the due process clause, and that a debtor's prison will be created for all who do not, or can not, within ten (10) days make good any check returned for insufficient funds. But certainly, we should not state that a statute which arbitrarily picks only one of many rational presumptions, as here, meets that most stringent test. The decisions below violate the 14th Amendment, and were decided by the State Courts in a way not in accord with applicable decisions of this Court, and not theretofore decided by this Court.

CONCLUSION

For the reasons set forth above, a writ of certiorari

should be granted to review the judgment of the Court of Appeals of Kentucky which was affirmed by a denial of petitioners Motion for Discretionary Review before the Supreme Court of Kentucky.

Respectfully submitted,

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Attorneys for Petitioner

JESSAMINE CIRCUIT COURT

NICHOLASVILLE, KENTUCKY, JULY 2, 1976

COMMONWEALTH OF KENTUCKY, Plaintiff

V. JUDGMENT

RONALD PATTERSON, Defendant

OPEN COURT
TIME _____ ENTERED
O.B. 9A PAGE 388
ATTN: V. Burton, C.J.C.C.
By M. Miller, D.C.

This 2nd day of July, 1976, the defendant Ronald Patterson appeared in open court with his attorney, did not appear, and Harlan Veal appeared as attorney for the Commonwealth, the court informed the defendant that he has been found guilty of the crime of theft by deception by (a jury) on his plea of (not) guilty, the court inquired of the defendant and his counsel whether they had any legal cause to show why judgment should not be pronounced, and afforded defendant and his counsel an opportunity to make statements in the defendant's behalf and to present any information in mitigation of punishment, and no sufficient cause was shown why judgment should not be pronounced, and it is therefore by the court:

ADJUDGED that the defendant is guilty of the crime of theft by deception and his punishment is fixed at confinement under the custody of the Bureau of Corrections for a period of one year; and it is FURTHER ORDERED AND ADJUDGED that this sen-

tence of one year (sic) shall run (concurrently with) (consecutive to and begin at the expiration of) the sentence of ——— years imposed on the defendant under indictment No. ———— of the ———————— Circuit Court; and it is FURTHER ORDERED AND ADJUDGED that the County Sheriff shall deliver the defendant to the custody of the Bureau of Corrections hereunder at such location within this state as the Bureau shall designate.

ADJUDGED that pursuant to KRS 532.120 it is ordered that the defendant shall receive jail credit time of 6 days on the within sentence imposed.

After fixing sentence, the court informed the defendant of his right to appeal to the Court of Appeals of Kentucky with the assistance of counsel, and of his right to a free appeal, including free counsel and free transcript if he could not afford Same. Pending appeal (defendant's bail is fixed at $2,000.00) (defendant is to be held without bail).

/s/ HENRY C. COX,
Circuit Judge
Jessamine Circuit Court

APPENDIX

OPINION RENDERED: July 8, 1977
TO BE PUBLISHED

Court of Appeals of Kentucky

FILE NO. CA-405-MR

RON PATTERSON - - - - - Appellant

APPEAL FROM JESSAMINE CIRCUIT COURT
V. HONORABLE HENRY C. COX, JUDGE
NO. 76C-6

COMMONWEALTH OF KENTUCKY - Appellee

AFFIRMING

BEFORE: HAYES, HOWARD AND WINTERSHEIMER, JUDGES.

HAYES, JUDGE. This is an appeal wherein the appellant, Patterson, attacks the constitutionality of the "cold check" statute, KRS 514.040.

Ron Patterson, a thirty-six (36) year old Baptist minister, had a part-time job selling handcrafted leather goods to retail outlets. While selling his leather wares, Patterson became acquainted with one John Rankin of Rankin & Grider, Inc., importers and exporters of leather products with offices in Nicholasville, Kentucky. Patterson sold Rankin some watch bands and Rankin told Patterson he could sell him

some leather ponchos at a low price. As a result, Patterson on October 9, 1975, ordered from Rankin a large quantity of ponchos. The sale amounted to $2,955.04 for which Patterson gave his check, No. 113. At this time, Rankin and Patterson discussed Rankin ordering some $10,000.00 worth of leather goods for Patterson at a substantial discount to Patterson. Check No. 113 was deposited by Rankin in his bank on October 10, 1975, and on October 17th the check was returned by the drawee bank, First and Farmers National Bank of Somerset, Kentucky, with a slip explaining that there were insufficient funds in the account of the drawer, Patterson, to cover the check. On the same date Rankin told Patterson that "the check had come back insufficient funds and he told me to run it back through again". On October 18th Rankin ran the check through the bank again. The check "bounced" again for insufficient funds. The check was returned to Rankin on October 24th. From this point the testimony is in conflict on whether the $1,000.00 money order received by Rankin from Patterson on October 28th and an additional $400.00 money order received by Rankin from Patterson on November 6, 1975, were in part payment for check No. 113 or on open account for the later ordered goods in the amount of $7,000.00. In any case, Rankin, after discussing the "cold check" No. 113 with Patterson some eighteen (18) times, filed suit in Jessamine Circuit Court. An arrest order was issued and Patterson was indicted for violation of KRS 514.040. Upon trial by a jury, appellant was found guilty and sentenced to one (1) year in the penitentiary.

The applicable Kentucky Penal Code provision is found in KRS 514.040, which is as follows:

(1) A person is guilty of theft by deception when

he obtains property of another by deception with intent to deprive him thereof. A person deceives when he intentionally:

* * *

(e) Issues or passes a check or similar sight order for the payment of money, knowing that it will not be honored by the drawee.

* * *

(4) For purposes of subsection (1), an issuer of a check or similar sight order for the payment of money is presumed to know that the check or order, other than a postdated check or order, would not be paid if:

* * *

(b) Payment was refused by the drawee for lack of funds, upon presentation within thirty (30) days after issue, and the issuer failed to make good within ten (10) days after receiving notice of that refusal.

The net result of the "cold check" statute is that the knowledge required by subsection (e) is imputed to the issuer of the check if he does not make the check good within ten (10) days after he learns the check has been dishonored. This imputed knowledge in turn meets the requirements of subsection (1) concerning "intent to deprive".

Patterson contends that this rebuttable presumption is "irrational and arbitrary" and therefore unconstitutional as a violation of the 14th Amendment of the U. S. Constitution. This is a case of first impression in Kentucky.

In determining whether or not a criminal statute making one fact presumptive or prima facie evidence of another fact satisfies the due process requirements of the 14th Amendment to the U. S. Constitution, cer-

tain standards have been established by the U. S. Supreme Court:

(1) There must be a rational connection between the fact proved and the ultimate fact presumed, *U. S. v. Gainey*, 380 U. S. 63, 85 S. Ct. 754, 13 L. Ed. 2d 658 (1965).

(2) An inference is "irrational" or "arbitrary" and hence unconstitutional unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend, *Leary v. U. S.*, 395 U. S. 6, 89 S. Ct. 1532, 23 L. Ed. 2d 57 (1969).

(3) The evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt. This is the most stringent test, *Barnes v. U. S.*, 412 U. S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973).

Mr. Justice Powell, delivering the opinion of the court in *Barnes v. U. S., supra*, stated:

> To the extent that the "rational connection", "more likely than not" and "reasonable doubt" standards bear ambiguous relationships to one another, the ambiguity is traceable in large part to variations in language and focus rather than to difference of substance. What has been established by the cases, however, is at least this: that if a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable doubt standard . . . as well as the more-likely-than-not standard, then it clearly accords with due process.

As noted in 35 *A. L. R.* 375, 43 *A. L. R.* 49 and 95 *A. L. R.* 486 most state statutes on worthless checks require the intent to defraud as an essential element.

These statutes commonly contain the "prima facie" presumption or inference provision of intent to defraud. Of couse these are rebuttable presumptions and conviction will not be had where the accused can satisfactorily explain otherwise. In other words, the statutes generally do not create conclusive presumptions which normally are held unconstitutional because such are within the sole province of the jury.

In interpreting a Kansas Statute very much like the Kentucky Statute, the court stated in *State v. Haremza*, 213 Kan. 201, 515 P. 2d 1217 (1973):

> One of the well-recognized presumptions of law is that a person intends all the natural and probable consequences of his voluntary acts. Where a person has written an insufficient funds check and receives property or other consideration therefore from the payee of the check, and further where the maker of the check has been notified that the check has not been paid and fails to make payment within seven days after such notice, we find that there is nothing unreasonable or arbitrary in making such fact prima facie evidence of fraudulent intent or guilty knowledge . . . The notice provision gives to the drawer of the check a final opportunity in which to make the check good and is peculiarly for his benefit. In a worthless check case it is obviously the defendant who has the more convenient access to evidence relating to his intent and knowledge. These are matters within his own head and usually are not within the knowledge of the prosecutor.

The legislature of this Commonwealth created the "cold check" statute in such a manner that proof of one fact (failure to cover the check within ten (10) days after due notice) is prima facie evidence of another fact (criminal intent to deceive) essential to the

guilt of the accused. The verdict still must rest upon all the evidence which must establish his guilt beyond a reasonable doubt.

Since the inference satisfied the reasonable doubt standard, and the "more-likely-than-not" standard, we conclude as the U. S. Supreme Court did in ***Barnes,*** *supra* and the Kansas Supreme Court did in *Haremza,* *supra* that this satisfies the requirements of due process.

The appellant in his brief states that to uphold his conviction would be the same as imprisoning him for a debt which is a violation of the Kentucky Constitution. We believe that the worthless check statute does not punish one for a debt but rather for a fraudulent act. Since intent to defraud is an essential element, it is not in violation of Section 18 of the Kentucky Constitution prohibiting imprisonment for debt.

The appellant's contention that the evidence was insufficient as a matter of law to sustain a conviction is clearly refuted by the record since there was an abundance of evidence to convict. And in light of all the evidence, the fact that the trial court erred in admitting evidence that Rankin borrowed money in order to buy the leather ponchos and in turn sell them to Patterson, was not harmful or prejudicial beyond a reasonable doubt.

The judgment is affirmed.

All concur.

Attorneys for Appellants

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Attorneys for Appellee:

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PROOF OF SERVICE

I, Dale B. Mitchell, Attorney for the Petitioner, herein and a member of the bar of this court, hereby certify that on this —— day of February, 1978, three (3) copies of the Petition for Writ of Certiorari were mailed first class, postage prepaid, to Hon. Robert F. Stephens, Attorney General, Frankfort, Kentucky 40601 and Hon. Harlan Veal, Commonwealth's Attorney, Main Street, Nicholasville, Kentucky, Counsel for Respondent. I further certify that all parties required to be served have been served.

/s/ _____

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Attorneys for Petitioner

Supreme Court of Kentucky

SC-395-D

(CA-405-MR)

RON PATTERSON - - - - - Movant

V. JESSAMINE CIRCUIT COURT
No. 76C-6

COMMONWEALTH OF KENTUCKY - Respondent

ORDER DENYING DISCRETIONARY REVIEW

The motion of Ron Patterson for a renew of the decision of the Court of Appeals is denied, and the decision stands affirmed.

ENTERED November 14, 1977.

/s/ JOHN S. PALMORE
Chief Justice

Commonwealth of Kentucky

COURT OF APPEALS
MANDATE

RON PATTERSON

FILE No. CA-405-MR **APPEAL FROM JESSAMINE**

VS. **OPINION RENDERED** July 8, 1977

Circuit Court Action No. 76C-6

COMMONWEALTH OF KENTUCKY

The Court being sufficiently advised, it seems there is no error in the judgment herein.

It is therefore considered that said judgment be affirmed; which is ordered to be certified to said Court.

It is further considered that the appellee recover of the appellant its cost herein expended.

NOVEMBER 14, 1977 — Movant's motion for Discretionary Review denied by the Supreme Court.

/s/ JOHN C. SCOTT, Clerk

A COPY ATTEST

(SEAL)

ISSUED November 18, 1977.

"QUESTIONS OF LAW"

Excerpted from Petitioner's Brief Before the Court of Appeals of Kentucky

1. Whether the presumed fact of "knowing . . . that the check . . . would not be paid", under KRS 514.040 (4), is an irrational and arbitrary, and hence unconstitutional statute, when the presumption flows from the proved facts that "payment was refused by the drawer for lack of funds, upon presentation within thirty days after issue, and the issuer failed to make good within 10 days after receiving notice of that refusal".

"QUESTIONS OF LAW"

Excerpted From Petitioner's Motion for Discretionary Review Before the Supreme Court of Kentucky

1. Whether the presumed fact of "knowing . . . that the check . . . would not be paid", under KRS 514.040 (4), is irrational and arbitrary, and hence an unconstitutional statutory presumption, when the presumption flows from the proved facts that "payment was refused by the drawer for lack of funds, upon presentation within thirty days after issue, and the issuer failed to make good within 10 days after receiving notice of that refusal".